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In the Supreme Court of the United States

OCTOBER TERM, 1983

HERMAN S. SOLEM, WARDEN, and MARK V. MEIERHENRY, ATTORNEY GENERAL OF SOUTH DAKOTA, PETITIONERS

v.

JOHN BARTLETT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Act of May 29, 1908 (35 Stat. 460 *et seq.*) immediately and irrevocably severed from the Cheyenne River Indian Reservation the area then opened up to purchase by settlers, so that the State of South Dakota (which has not assumed jurisdiction under Public Law 280) now enjoys criminal jurisdiction over offenses involving Indians occurring on non-Indian lands within the opened area.

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INTEREST OF THE UNITED STATES

The special relationship of the United States to the Indian Tribes is too familiar to require restatement. It precedes the Constitution, was confirmed by it, and is evidenced in a long course of treaties and Executive Orders. The attendant national powers and duties are particularized in a multitude of Acts of Congress. Of immediate relevance here is the status of a remnant of the Great Sioux Reservation—itself established by treaty in 1868 and later reduced and broken up into segments by congressional legislation in 1889—as it may have been further diminished by an Act of 1908. The result will affect, inter alia, the continuing federal responsibility for

law enforcement within the disputed area under 18 U.S.C. 1152 and 1153.

In light of this continuing federal interest, the Court invited the Solicitor General to file a brief expressing the views of the United States at the jurisdictional stage. Now that the case is to be heard on the merits, we deem it appropriate to make a further submission.

STATEMENT

1. Respondent John Bartlett, an enrolled member of the Cheyenne River Sioux Tribe, pleaded guilty in 1979 in a South Dakota state court to a charge of attempted rape. The crime took place on an alienated parcel of land in Eagle Butte, South Dakota, which lies within the portion of the original Cheyenne River Indian Reservation that was opened to settlement by the Act of May 29, 1908, ch. 218, 35 Stat. 460 *et seq.* Pet. App. A2-A3.[1] After Bartlett's request for post-conviction relief was denied by the South Dakota court in which he had entered his plea (Pet. App. A2 n.1), he filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. (Supp. V) 2254, in the United States District Court for the District of South Dakota. There, he contended that the crime was committed in "Indian country", as defined in 18 U.S.C. (Supp. V) 1151, and that, accordingly, exclusive jurisdiction to prosecute him rested with the Sioux Tribe or the federal government. The State of South Dakota, on the other hand, argued that the 1908 Act terminated the reservation

[1] The Reservation was once part of the Great Sioux Reservation, established by the Treaty of Apr. 29, 1868, 15 Stat. 635 *et seq.*, from which the Black Hills area was taken in 1877. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 *et seq.* The Cheyenne River Reservation emerged as a separate unit in 1889, when another substantial portion of the large Reservation was ceded and the remainder was carved up into six distinct Reservations. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 589 (1977). As defined in 1889, the Cheyenne Sioux Reservation comprised about 2.8 million acres. The area opened in 1908 embraces some 1.6 million acres.

status of the portion opened to sale to non-Indians and divested the Tribe and the United States of jurisdiction over alienated lands in that area. Pet. App. A2-A3.[2]

2. The district court applied the rulings of the Court of Appeals for the Eighth Circuit in *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973), and *United States* v. *Dupris*, 612 F.2d 319 (1979), vacated and remanded, 446 U.S. 980 (1980), to the effect that the Cheyenne River Indian Reservation was not disestablished or diminished by the 1908 Act. Therefore, despite contrary decisions by the South Dakota Supreme Court,[3] the district court held that the State was precluded from exercising its criminal jurisdiction over Bartlett since the opened portion remained "Indian country" within the meaning of 18 U.S.C. (Supp. V) 1151. The court granted the writ of habeas corpus, but stayed the effect of its decision pending the outcome of any appeal. Pet. App. A1-A8, A96-A97.

3. The court of appeals, sitting en banc, affirmed (Pet. App. A9-A11), Judges McMillian and Arnold dissenting (Pet. App. A11-A12).[4] The court declined to overrule *United States* v. *Dupris*, and found that *Dupris*, *United States* v. *Long Elk*, 565 F.2d 1032 (8th Cir. 1977), and *United States ex rel. Condon* v. *Erickson*, were

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[2] It was correctly assumed by both parties that, having chosen not to invoke the option offered by Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 *et seq.*, as amended in 1968, now 18 U.S.C. 1162, 25 U.S.C. 1321-1326, 28 U.S.C. 1360), South Dakota could exercise no criminal jurisdiction over a tribal member within "Indian country," which includes alienated parcels embraced by federally recognized Indian Reservations. See *Williams* v. *United States*, 327 U.S. 711, 714 (1946); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *John*, 437 U.S. 634 (1978).

[3] *South Dakota* v. *Janis*, 317 N.W.2d 133 (1982); *Stankey* v. *Waddell*, 256 N.W.2d 117 (S.D. 1977).

[4] The United States, the Cheyenne River Sioux Tribe, and the Standing Sioux Tribe participated as amici curiae in support of Bartlett. The Counties of Dewey, Corson and Ziebach, South Dakota, and Sioux County, North Dakota, participated as amici curiae in support of the State.

consistent with this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). Pet. A10-A11.

INTRODUCTION AND SUMMARY OF ARGUMENT

The only issue before the Court is the continuing status as "Indian country" of a portion of one Indian Reservation in South Dakota. That question has been squarely decided against the claim of "diminishment" or "disestablishment" in at least three holdings of the Court of Appeals for the Eighth Circuit, *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973); *United States* v. *Dupris*, 612 F.2d 319 (1979), and the present case. See also, *United States* v. *Fay*, 668 F.2d 375 (1981), affirming in part a criminal conviction under 18 U.S.C. 1153 in respect of offenses committed at Eagle Butte without discussion of the jurisdictional issue. The first of these decisions has been cited and quoted with approval in *Mattz* v. *Arnett*, 412 U.S. 481, 497 n.19, 505 (1973), a precedent since reaffirmed by this Court. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 444, 447-449 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977). What is more, on two occasions, the Eighth Circuit has expressly revisited its seminal *Condon* decision in light of this Court's more recent *DeCoteau* and *Rosebud* rulings and the contrary holdings of the South Dakota Supreme Court and has determined to adhere to its conclusion. *E.g.*, *United States* v. *Long Elk*, 565 F.2d 1032, 1034-1040 & n.10 (1977); *United States* v. *Dupris*, 612 F.2d at 321-323. And, now, after reconsidering the matter en banc, that court has firmly settled the question.

In this situation, there would normally be no occasion for further review. In *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), *Mattz*, *DeCoteau* and *Rosebud*, this Court announced the governing guidelines. These have remained unchanged. As the Court was at pains to de-

clare in *DeCoteau* (420 U.S. at 447), "[w]e adhere without qualification to both holdings [*Seymour* and *Mattz*] and the reasoning of those decisions." No one can doubt that the court below has been meticulous in its attempt faithfully to apply those standards in each situation. It was, we stress, the Eighth Circuit that first found diminishment in the case of the Rosebud Reservation. *Rosebud Sioux Tribe* v. *Kneip*, 521 F.2d 87 (1975), aff'd, 430 U.S. 584 (1977). The court of appeals was then credited with a "careful and comprehensive opinion." 430 U.S. at 585. After giving the matter equally full consideration on three occasions, it cannot be faulted for reaching a different result, on different facts, in the case of the Cheyenne River Reservation.

We cannot suppose this Court is now inclined to reconsider its own decisions and to revisit every lower court ruling implementing them—especially those previously cited with approval.[5] Acquiescing in that invitation—apparently tendered by petitioners—would impose an awesome burden and entail very unsettling consequences for all concerned, Indians and non-Indians alike. Rather, we assume the Court has determined to review the present case because of the conflicting decisions of the South Dakota Supreme Court. *Stankey* v. *Waddell*, 256 N.W.2d 117 (1977); *South Dakota* v. *Janis*, 317 N.W.2d 133 (1982). Thus far, that court has declined to accept the ruling of the federal appellate court as settling this issue of federal law. Apparently, the South Dakota Supreme Court was most recently emboldened (in *Janis*) by this Court's action (446 U.S. 980 (1970)) vacating the Eighth Circuit's *Dupris* decision as probably moot.[6] See 317

[5] In *Mattz*, this Court listed the 1908 Act involved here as an example of an "opening" statute that did not work disestablishment and approvingly cited the Eighth Circuit's *Condon* decision, followed in this case. 412 U.S. at 497 n.19, 505 n.23.

[6] On remand, the case was ultimately mooted by the court of appeals' direction to the district court to grant the government's motion to dismiss the information against Dupris. 664 F.2d 169 (1981).

N.W.2d at 137-138. At all events, now that the Court has granted review, it is to be hoped that a clear message will emerge, discouraging other state courts from prolonging disruptive controversies over the status of Indian Reservations. We urge the Court to re-affirm the controlling standards and to conclude that they were correctly applied by the court of appeals.

A.

We begin by re-examining the Court's past decisions in an attempt to distill the general principles that govern issues of Reservation "termination," "disestablishment," or "diminishment." The critical question remains whether the statute invoked worked an immediate and irrevocable cession, or merely opened up a part of the Reservation to purchase by settlers, with the expectation that, in due course, the entire opened area would be acquired and then separated from the remaining Indian territory. Our submission is that where such an opening scheme substantially failed and a significant portion of the opened lands remained unsold when Congress changed policy and halted sales, the area retains Reservation status.

B.

Applying these guidelines to the present case, we conclude that the Cheyenne River Reservation has not been disestablished or diminished. The Act of 1908 involves no outright cession, nor even any agreement by the Tribe. It is, rather, a typical "opening" statute, indistinguishable from the legislation considered in *Seymour* and *Mattz*. And, unlike the result in *Rosebud*, most of the opened lands were never sold and were ultimately "restored" to full Reservation status. In other respects, also, the opened area of the Cheyenne River Reservation has remained Indian. In these circumstances, it seems consistent with both the historic intent of Congress and more recent legislative policy to preserve the original boundaries of the Reservation.

ARGUMENT

A. The Governing Principles

1. In considering questions relating to the "termination," "disestablishment" or "diminishment" [7] of Indian Reservations, we must remember that they almost inevitably arise out of congressional legislation enacted near the turn of the last Century, a time when the Political Branches were wholly committed to a policy designed, in due course, to liquidate the Reservation system and accomplish the assimilation of the Indian. The first step, exemplified by the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*, was to encourage—and shortly to compel—the Indian to abandon his roaming habits, his communal life, his "tribalism," and to become a self-sufficient farmer, tied to a homestead.[8] To that end, property ownership was to be individualized, and the not unimportant side benefit of allotting the Reservation land among the members would be to open up the substantial "surplus" to white settlers. Although the precise mechanisms varied, the ultimate objectives were always the same: "educating" and "civilizing" the Indian, relieving the federal Treasury of burdensome annual subsidy payments, and releasing "unneeded" tribal land for exploitation by others. In every case, moreover, the expectation was that, sooner or later,

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[7] Like Petitioners, we speak of "diminishment" as synonymous with "disestablishment" and "termination," but as applied to a discrete portion, rather than the whole of the Reservation. So used, all three terms imply that the affected area has entirely and permanently lost its Reservation status. In the case of "diminishment," the affected portion is jurisdictionally removed from the subsisting Reservation, whose boundaries are redrawn to exclude that area. It does not, of course, follow that the same meaning should be attributed to the word "diminished" whenever it occurs in Legislative or Executive Branch documents.

[8] There were, to be sure, much earlier experiments with allotment, mainly with the same objectives as the later legislation. But few such plans were fully carried out. See F. Cohen, *Handbook of Federal Indian Law* 98-102, 129-130 (1982 ed.).

perhaps within a generation, the Tribe and its Reservation would cease to exist. See generally, F. Cohen, *Handbook of Federal Indian Law* 206-217 (1942); J. Kinney, *A Continent Lost—A Civilization Won* (1937); D. Otis, *History of the Allotment Policy*, reprinted in *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., Pt. 9, at 428 *et seq.* (1934). See also, *Montana* v. *United States*, 450 U.S. 544, 559-560 n.9 (1981).

This perception might lead us to view as disingenuous all attempts at pursuing the exact intent of Congress in the period 1890 to 1910 when it allotted and opened up particular Reservations. Disregarding fine points, one might be tempted to rush to the conclusion that the Congressional purpose was plain enough in each instance: termination or "disestablishment" of the Reservation, merely preserving for a limited time in protected status individual Indian homesteads. The upshot of this indiscriminate approach would be to end the Reservation status of every Reservation that has ever been allotted—some four-fifths of the total.[9] While individual allotments held in trust or subject to restrictions would continue to be "Indian country" (see 18 U.S.C. (Supp. V) 1151(b)), the territorial integrity of most Reservations would be destroyed, tribal governments would lose much of their reason for being, and all the problems associated with "checkerboard" jurisdiction would emerge.

To acquiesce in these results would break many solemn treaty promises made to the Indian, and, at this late date, the unsettling effect would be extreme. But the dispositive consideration is that reading an intent immediately to disestablish into every turn of the century stat-

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[9] According to one compilation, of the 229 Indian Reservations existing in 1936 (which comprised approximately 136 million acres in 1887), only 48 (totalling about 22 million acres) escaped allotment and opening up. With the notable exception of the Navajo Reservation (encompassing some 16 million acres in 1936), most of the unallotted Reservations were relatively small. See J. Kinney, *A Continent Lost—A Civilization Won*, App. at 350 (table), 351-356 (table) (1937).

ute providing for the allotment and opening up of Indian Reservations would attribute to Congress and the Executive a more callous disregard of Indian welfare than the record justifies. Latter-day popular history exaggerates when it portrays the Government of the United States as wholly captive to the "familiar forces" of the times, ready to take the Indian's land by any means and without concern for his fate. As this Court stressed in *Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973), although elimination of separate Reservations was the *ultimate* goal, the actual consequence of allotment was often to "continue the reservation system" for a limited time. See, also, *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 478-479 (1976).

So, also, to hold that all Reservations opened up in this period were then permanently disestablished would trivialize the effect of the Indian Reorganization Act of 1934, 25 U.S.C. (& Supp. V) 461 *et seq.* (IRA), and more recent legislation, which radically changed our approach to Indian affairs. See, *e.g.*, *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151-158 (1973); *Mattz*, 412 U.S. at 496 & nn.17 and 18; *Moe*, 425 U.S. at 472-478; *Bryan* v. *Itasca County*, 426 U.S. 373, 388-389 n.14 (1976). Except as it is unavoidable, we ought not conclude that the remedy came too late for most Indians and most Reservations. This Court "cannot remake history." *DeCoteau* v. *District County Court*, 420 U.S. 425, 449 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 615 (1977). But, where implementation was not completed, the Court need not carry forward into the 1980s a policy so firmly repudiated by Congress since the 1930s. See *Moe*, 425 U.S. at 478-479.

This is not "revisionism." As early as 1884 this Court entertained "no doubt" that, until the lands opened to settlers were sold, the Indians remained the equitable owners and that such areas could not be deemed "public lands." *United States* v. *Brindle*, 110 U.S. 688, 693 (1884). A few years later, the reserved status of similar lands was held to defeat a state's claim to included school sections. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394-402

(1902).[10] See, also, *United States* v. *Thomas*, 151 U.S. 577 (1894); *Wisconsin* v. *Hitchcock*, 201 U.S. 202 (1906). By 1909, the Court had established a presumption against termination or diminishment of Reservations and the elimination of the protective federal umbrella. *United States* v. *Celestine*, 215 U.S. 278, 285-287, 290-291; *United States* v. *Sutton*, 215 U.S. 291, 294-295. See, also, *Spalding* v. *Chandler*, 160 U.S. 394, 403-405 (1896). And, in the next three decades, there followed a host of decisions reflecting the same solicitude to maintain the special status of Indian land. *E.g.*, *Hollowell* v. *United States*, 221 U.S. 317 (1911); *Choate* v. *Trapp*, 224 U.S. 664 (1912); *Ex parte Webb*, 225 U.S. 663 (1912); *Donnelly* v. *United States*, 228 U.S. 243 (1913); *United States* v. *Mille Lac Band of Chippewas*, 229 U.S. 498, 509 (1913); *United States* v. *Sandoval*, 231 U.S. 28 (1913) (disapproving *United States* v. *Joseph*, 94 U.S. 614 (1877)); *United States* v. *Pelican*, 232 U.S. 442 (1914); *United States* v. *Nice*, 241 U.S. 591 (1916) (overruling *In re Heff*, 197 U.S. 488 (1905)); *United States* v. *Soldana*, 246 U.S. 530 (1918); *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Ramsey*, 271 U.S. 467 (1926); *United States* v. *Chavez*, 290 U.S. 357 (1933); *United States* v. *McGowan*, 302 U.S. 535 (1938).

These early precedents make clear that the Court was adhering to a consistent approach when, more recently, it expressly affirmed the principle that allotment and opening up of tribal lands does not presumptively end the Reservation or reduce its boundaries. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, *supra*; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. at 478-479. That remains the rule today, as the Court summed it up in *DeCoteau*, 420 U.S. at 444:

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[10] Unlike some later opening legislation, the 1889 Act involved in *Minnesota* did not contain a special "school provision," stipulating outright purchase by the United States of Sections 16 and 36 and conveyance to the State. See n.14, *infra*.

> This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States* v. *Celestine*, 215 U.S. 278, 285. The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174, quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367. Accordingly, the Court requires that the "congressional determination to terminate • • • be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz* v. *Arnett*, 412 U.S., at 505. See also *Seymour* v. *Superintendent*, 368 U.S. 351, and *United States* v. *Nice*, 241 U.S. 591. In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government. *Mattz* v. *Arnett*, *supra*, and *Seymour* v. *Superintendent*, supra.

See, also, *Rosebud*, 430 U.S. at 586-587 ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status."); cf. *United States* v. *John*, 437 U.S. 634 (1978).

To be sure, as *DeCoteau* and *Rosebud* illustrate, there are instances in which a Reservation must be found to have been irrevocably terminated or diminished. See pp. 14-17, *infra*. But the teaching of this Court over three-quarters of a century remains that such a finding requires very clear evidence of congressional intent to effect a present—and not merely an eventual—dissolution or dismemberment of the Reservation. In assessing that intent, we must of course be attentive to the contemporary

understanding. But, again, it is essential to distinguish future expectations from immediate consequences.[11]

2. How then do we distinguish between action effectively ending the Reservation status of the whole or a part of recognized Indian lands and a mere opening up of such lands? As we have said, legislation enacted between 1890 and 1910 was written, often carelessly, in the expectation that the entire Reservation system would be dismantled within a relatively short span. And it is equally clear that "Reservation status" for alienated lands was not yet a familiar concept.[12] Accordingly, we should

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[11] In this context, it is important to remember that the only parties to any cession were the Tribe and the United States. Future settlers, albeit intended beneficiaries, can claim only what the Congress secured, not some larger immunity they may have supposed would attach to their acquisition of surplus Indian land. At all events, the "legitimate expectations" of white settlers can be accommodated without destroying the Reservation status of opened areas. See *Montana* v. *United States*, 450 U.S. at 559-561 & n.9. But, whatever the equities may be in favor of individual holders of "fee" parcels who are challenging Reservation ordinances, no comparable claim can be asserted by the state and its counties. They plainly were not parties, directly or indirectly, to any agreement or legislation touching the status of the Reservation. The interest the states and counties now assert—seldom clearly articulated—cannot help us in determining the original understanding.

[12] At the time, the usual focus was as to whether former tribal lands remained "Indian country" for purposes of exercising federal criminal jurisdiction and prosecuting violations of federal liquor law that were restricted to "Indian country." The prevailing view was that fully alienated tracts, including unrestricted allotments of tribal members, ceased to be "Indian country." *E.g.*, *Bates* v. *Clark*, 95 U.S. 204 (1877); *Dick* v. *United States*, 208 U.S. 340 (1908); *Clairmont* v. *United States*, 225 U.S. 551 (1912). It was only in 1932 (Act of June 28, 1932, ch. 284, 47 Stat. 336 *et seq.*) that ceded rights-of-way across Reservations were included, and in 1948 (see 18 U.S.C. 1151(a)) that all lands within a Reservation, including those patented in fee, were declared "Indian country." The question of *tribal* jurisdiction over non-Indians on alienated parcels within the Reservation was not then a live issue, except in the case of the Civilized Tribes of the Indian Territory. There,

not be surprised, in most cases, to find no express legislative discussion of Reservation status or Reservation boundaries as affected by opening up of tribal lands for sale to settlers. In the climate of the times, the only meaningful question is whether the legislation meant to accomplish a *present, unequivocal* and *irrevocable* transfer of Reservation lands from the Tribe to the United States.

a. In the treaty days, before 1871, such cessions were, of course, quite frequent. Even though part or even the whole of the "price" was often to be paid in installments (whether in money or in kind, or both) over several years, the typical treaty cession leaves no doubt that the transfer was complete upon ratification. *E.g., United States* v. *Omaha Tribe of Indians*, 253 U.S. 275 (1920).[13] Like "cessions," expressly so termed, were subsequently accomplished by formal "agreement," incorporated in Acts of Congress. That was the form of the transaction by which the Black Hills were severed from the Great Sioux Reservation in 1877, and much other land in 1889. See Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 *et seq.*; Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* Similar cession agreements effected the disestablishment of the North Half of the Colville Reservation and the termination of the Lake Traverse Reservation. See *Seymour*, 368 U.S.

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however, tribal taxing authority over activities in alienated town sites was sustained. *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906). See, also, *Morris* v. *Hitchcock*, 194 U.S. 384, 392 (1904), citing with approval an Attorney General's opinion upholding tribal taxation of hay exports from the Reservation even if the non-Indian taxpayer were "the absolute owner of the land on which the hay was raised." This history is recounted in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139-144 (1982).

[13] Even then, there were exceptions. Some treaties provided for payment of "ceded" lands, at least in part, by turning over to the Tribe the proceeds of sale received from settlers. In such cases, the Court characterized the cession as incomplete until the tracts were sold, holding that the Indians remained the equitable owners and that the ceded area should not be deemed "public lands." *E.g., United States* v. *Brindle, supra.*

at 355; *DeCoteau*, 420 U.S. at 455; *id.* at 455-460 (App. A to opinion). And there are many other instances. See, *e.g.*, *Mattz*, 412 U.S. at 504 n.22; *DeCoteau*, 420 U.S. at 439-440 n.22. See, also, the Act of June 6, 1900, ch. 813, 31 Stat. 672 *et seq.*, upheld in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

Sometimes, to be sure, the purported "agreement" had not been approved by the requisite number of tribal members stipulated in an earlier treaty, or consent had been induced by questionable methods. *E.g.*, the case of the Black Hills, discussed in *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 381-382 & n.13 (1980). But, in light of *Lone Wolf*, that is irrelevant to our inquiry. The critical fact in all these cases is that Congress exacted a *present and total surrender of all tribal interest* in the ceded land in return for an *unconditional commitment* by the United States to an agreed payment, even if inadequate or delayed. Although, usually, the Government immediately opened the area to settlers, the Indians, having irrevocably and completely divested themselves of title for a fixed price, had no interest in those subsequent events.

b. On the other hand, during the decade preceding and especially that following 1900, there were more numerous arrangements under which the United States, with or without the formal concurrence of the Tribe, opened up tribal lands to sale without any firm obligation to do more than credit or pay over the proceeds to the Tribe when realized.[14] In effect, the Government was a mere

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[14] There was, commonly, a special exception for "school sections" within the opened area, which were purchased outright by the United States and conveyed to the state. See, *e.g.*, Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352 *et seq.*, quoted in the following note. But, as *Ash Sheep* makes clear, such a provision has no effect on the continuing Indian status of the remaining lands opened up. See pp. 17-19, *infra*. The Court reiterated this view as recently as *DeCoteau*, 420 U.S. at 445-446 n.33: a "school provision" of this kind "implies nothing about the presence or absence of state civil or criminal jurisdiction over the remainder of the ceded lands." A sufficient example is the Crow Allotment Act of June 4, 1920, ch. 224, § 16, 41 Stat. 756, which provided for the purchase by the

sales agent. No doubt, the primary motive for resorting to this type of scheme was to avoid committing the United States to any independent financial obligation.[15] And it was presumably anticipated that, in due time, all tracts would be sold and that the upshot would be the same as in the case of a straightforward cession. But, until that day, the transfer was incomplete.

Unsurprisingly, the clear line between outright cession and mere opening up of tribal lands was not always observed. As *Rosebud* illustrates, Congress sometimes combined features of both schemes in a given case. Thus, the 1904 Act affecting a portion of the Rosebud Sioux Reservation grew out of a straightforward cession agreement with the Tribe, but the payment provisions were trans-

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United States and grant to the State of Montana of Sections 16 and 36 within the Crow Reservation. No one has ever contended that this legislation affected the status or boundaries of the Reservation. See *Montana* v. *United States*, 450 U.S. at 548. Since Montana was admitted by the same Enabling Act as South Dakota, we must assume the Court was misled in *Rosebud* in suggesting that implementation of an Enabling Act school section grant within Indian country implies disestablishment of the affected portion of the Reservation. See 430 U.S. at 599-601. In our view, *DeCoteau* correctly concluded that a school section provision is wholly neutral on the issue of disestablishment.

[15] An express statement of this concern is reflected in Section 8 of the Crow Agreement, incorporated in the Act of Apr. 27, 1904, ch. 1624, 33 Stat. 361, quoted in *Ash Sheep*, 252 U.S. at 165-166:

> That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.

This was a standard provision in opening up legislation, including the 1908 Act now before the Court. See Pet. Br. App. A14-A15.

muted by the Congress so as to resemble a typical opening up arrangement. See 430 U.S. at 590-598. In part because the immediate cession language was retained in the first statute (*id.* at 591, 596-597) and because the later Acts of 1907 and 1910 were seen as derivative legislation, carrying forward the same "baseline" objective (430 U.S. at 605-615), the Court concluded that an intent immediately to diminish the Reservation must be found. But we do not read *Rosebud* as erasing the traditional distinction.[16] The rule of *Seymour* and *Mattz* has not

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[16] Notwithstanding what was written in *Rosebud*, 430 U.S. at 613-614 & n.47, we fail to appreciate the significance for Reservation status of a provision prohibiting the introduction of liquor into an "opened" area for twenty-five years—at least when, as there and here, it encompasses "lands allotted, those retained or reserved," as well as "surplus land sold, set aside for town-site purposes, granted to the State * * * or otherwise disposed of." See Act of May 30, 1910, ch. 260, § 10, 36 Stat. 451 (Rosebud Act); Act of Feb. 17, 1910, ch. 40, 36 Stat. 196 *et seq.*, amending Section 8 of the 1908 Act before the Court (Pet. Br. App. A18-A20). Under the Act of July 23, 1892, ch. 234, 27 Stat. 260 *et seq.*, as amended by the Act of Jan. 30, 1897, ch. 109, 29 Stat. 506 *et seq.*, the prohibition already applied to all restricted allotments whether or not within a Reservation, but, at least by clear implication, did not cover unrestricted allotments or alienated parcels even inside a Reservation. See *United States* v. *Sutton*, 215 U.S. at 293. See also, n.12, *supra*. Indeed, that is the general rule today with respect to "non-Indian communities" within Reservations. 18 U.S.C. 1154(c); see *United States* v. *Mazurie*, 419 U.S. 544 (1975). It follows that the provisions in the 1910 statutes quoted above were redundant with respect to allotments (until the restrictions were removed), but important as they affected alienated lands, even if the Reservation boundaries remained unchanged.

Again, the point is illustrated by the Crow Allotment Act of 1920, which, in Section 9 (41 Stat. 754), extended the liquor prohibition to fee tracts within the Reservation (including unrestricted allotments held by Indians, lands alienated to others, and state school sections)—an action which no one has suggested disestablished or changed the boundaries of the Crow Reservation. So, also, a like statute covering the Colville Reservation did not affect the result in *Seymour*. See Act of Aug. 31, 1916, ch. 424, 39 Stat. 672 *et seq.*, noticed by the Court, 368 U.S. at 356 n.12.

been repudiated and presumably continues to govern in any like situation.

3. The immediate consequences of opening up legislation not involving an unconditional present cession are clear enough. Putting aside allotments selected in the opened area and any school sections purchased outright for the state, the Tribe retained its beneficial title to the land until sold, as well as the right to any profits derived from their use. Only Indian occupancy rights were suspended—so that the land could be offered, more invitingly, with "vacant possession." In sum, as this Court repeatedly held in a series of cases including *Brindle*, *Mille Lac Band of Chippewas*, *Minnesota* v. *Hitchcock* and *Ash Sheep*, while unsold, such opened lands remained Indian for most purposes. The last decision states the situation aptly (252 U.S. at 165-166):

> It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust*. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394, 398 * * *.
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> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "Public lands" in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris*, 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the

> special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352, and as to this point the case is ruled by the *Hitchcock* and *Chippewa Cases*, *supra*. Thus, we conclude, that the lands described in the bill were "Indian lands" * * *.[17]

It is plain that the continuing tribal interest in the lands opened under these arrangements was not merely a right of reversion in the event the lands were never sold and the Government continued to decline to purchase them itself. There was not a completed sale, subject only to a condition subsequent. Nor was the Government "taking" the land without payment, exposing itself to an obligation, in due course, to make "just compensation" out of Treasury funds if settlers failed to provide the price. Compare *United States* v. *Sioux Nation of Indians*, *supra*. Indeed, the Congress expressly excluded that possibility. See n.15, *supra*. The transfer was, rather, an incomplete transaction, held in abeyance until payment should be

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[17] Usually, the lands "opened" under this type of legislation were not simply made available to all comers under the provisions of the general public land laws; rather, their disposition was governed by special conditions, typically involving classification and appraisal, installment payments, and, if no purchasers appeared after seven years, sale at public auction. A common provision expressly stipulated that "no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in [the President's] proclamation." *E.g.*, Sections 2-5 of the 1908 Act (35 Stat. 461-463) involved here, Pet. Br. App. A4-A12. And, of course, the proceeds of sale did not go to the Treasury as unrestricted moneys, but were required to be credited to the Tribe, with interest. *E.g.*, Section 6 of the same Act (35 Stat. 463), Pet. Br. App. A12. Obviously, this was a far cry from simply "restoring" the area unconditionally to the "public domain."

We note that the statutes involved in *Ash Sheep* and *Minnesota* v. *Hitchcock* incorporated agreements with the Tribe which purported to "cede" the lands that were to be opened to sale. But the Court looked to the substance of the transaction, not the terminology, and concluded that the "cession" was conditional, in effect suspended until and unless sales to settlers were realized. *A fortiori*, that must be the result where no agreement and no words of cession are present.

received from homesteaders. For the time being, the Indians' possessory rights were suspended, but that is all. And, at some point, if the scheme failed for lack of purchasers, the Tribe's right to resume occupancy presumably must be conceded—even without the benefit of "restoration orders" under the Indian Reorganization Act of 1934.[18] In the interim, the Indians' title had survived and there was no basis for altering the Reservation boundaries.[19]

The early cases, it is true, dealt only with *unsold* "surplus" lands. But, given that these retained their Reservation status—even if partially suspended—it would be incongruous to conclude that new boundaries should be drawn, in a crazy-quilt pattern, to exclude alienated parcels after Congress determined that they, also, should be

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[18] Section 3 of the IRA, 25 U.S.C. 463, authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation [heretofore] opened." Since legal title was to remain with the United States and the Tribe had never lost beneficial title, the practical effect of restoration orders under this provision was to return *use and occupancy rights* to the Tribe. As the Senate Report accurately recited, Section 3 of the IRA was intended to restore unsold "surplus" tracts "to tribal use." S. Rep. 1080, 73d Cong., 2d Sess. 2 (1934). Stated differently, restoration orders ended the suspended status of such areas. As we have said, that result must have occurred sooner or later if the surplus lands remained unsold for a very extended period. But the IRA and the restoration orders issued under it serve the useful function of mooting the question whether, in a given case, lapse of time had already effectivly ended the "opening" of tribal lands. Plainly, such restoration orders are not evidence that the Reservation status of the affected lands had been irretrievably lost. See *Rosebud*, 430 U.S. at 604 n.27.

[19] It is worth noting that Interior Department Regulations promulgated in 1912 "contemplated that remaining surplus lands, the proceeds of the disposal of which were for the benefit of the Indians, would be cooperatively administered by the Indian Office and the General Land Office, the Indian Office retaining jurisdiction of the use of the lands before they were sold and the General Land Office administering the final disposition of the lands." See 56 Interior Dec. 330, 339 (1938).

deemed "Indian country." 18 U.S.C. (Supp. V) 1151(a). At all events, that is what this Court squarely decided in *Seymour* and re-affirmed in *Mattz*.

4. There is a final caveat. In cases where the opened area of a Reservation was entirely—or almost entirely—sold off to non-Indian settlers before the process was halted by the change of policy enacted in 1934, it may well be right to treat the Reservation as diminished today. This is not merely a bow to current reality. Nor is it an impermissible attempt to construe turn of the century legislation in accordance with unpredictable future events. On the contrary, we reasonably may suppose that the sponsors of "opening up" legislation would have intended to end the Reservation status of the affected area *if and when* their expectations were fully realized, but not otherwise.[20] Then, as now, it must have seemed artificial to continue to treat as part of an Indian Reservation a discrete area, typically of large dimensions, once both land ownership and population had ceased to be Indian. Per contra, where no present cession was involved and disappointingly few settlers had taken up Congress's invitation, there was, and is, no justification for jurisdictionally separating from the Reservation "core" an adjacent tract that remains significantly Indian in every respect.

All else aside, this explains the result in *Rosebud*. As the Court there stressed, of the more than 2 million acres opened up by the Acts of 1904, 1907 and 1910, only some 4,600 remained unsold in 1938. 430 U.S. at 588 n.3. And, today, more than 90% of the opened area is non-Indian, both in population and land use. *Id.* at 605. In these circumstances, it was obviously difficult to conclude that

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[20] Where allotments, normally restricted for 25 years, were provided for in the opened area, it would be reasonable to suppose that the "Indian" character, or "Reservation status," of that area was intended to lapse at the end of the 25-year period—which also coincided in some cases with the time when the liquor prohibition would cease—assuming that, by then, the surplus lands also had been fully disposed of. See *Mattz*, 412 U.S. at 496.

Congress would have wished the affected area to retain Reservation status. At some point, the tail can no longer wag the dog.[21]

So saying, we imply no "majority rule" under which the status of opened tribal lands depends upon whether more or less than half the acres, or the population, remain Indian. One of the familiar consequences of the allotment policy is that, as a result of numerous exceptions to the restrictions on alienation, much of the acreage of even the unopened portion of some Reservations is today in non-Indian hands. *E.g.*, *Montana* v. *United States*, 450 U.S. at 548 (Crow Reservation); *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 3. So, also, the concentration of a large non-Indian population in a few alienated town sites within a Reservation sometimes left the Indians grossly outnumbered. *E.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Since these disparities do not affect the status of the Crow Reservation, the Quinault Reservation, or the Yakima Reservation, there is no cause to treat like patterns of land ownership or population as inconsistent with Reservation status for once opened areas. It is only when the Indian character of former tribal lands is wholly destroyed that it seems justifiable to sever the area from the Reservation.

B. The 1908 Act

Applying the principles just outlined to the case before the Court yields a clear conclusion against diminishment

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[21] This likewise explains the ultimate redrawing of Reservation boundaries to exclude the opened area of the Red Lake Reservation considered in *Minnesota* v. *Hitchcock*, and the area of the Crow Reservation affected by the 1904 Act involved in *Ash Sheep*. In both cases, almost all the unallotted land in the opened portion of the Reservation was sold before 1934. See *United States* v. *Holt State Bank*, 270 U.S. 49, 52-53 (1926). In the case of the Crow Reservation, only some 10,000 acres (out of a total of more than 1 million acres) in the area opened by the 1904 Act remained unsold, as attested by the "restoration" Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121.

of the Cheyenne River Reservation. The points are quickly stated.

1. First and foremost, the 1908 Act involved here is typical opening up legislation, of a piece with the statutes considered in *Seymour* and *Mattz*. There was no present cession for an agreed price, but, instead, an arrangement whereby the Government—expressly avoiding any obligation to buy itself—undertook to sell tribal lands to settlers for the account of the Tribe. No language of cession is to be found, nor any other terms "precisely suited" to disestablishment. Indeed, there was no prior agreement with the Tribe.

The basic character of the congressional action is perfectly clear. It cannot be changed into an immediately effective cession merely because the drafters carelessly spoke of the unopened portion of the Reservation as "diminished" in one place (§ 2 (35 Stat. 461); Pet. Br. 19-20), and, in another (§ 9 (35 Stat. 464); Pet. Br. App. A16), to the opened area as "part of the public domain." These were, of course, half-truths. Except for any allotments selected in the territory opened to settlers, the area of Indian occupancy *was* diminished temporarily; and, ultimately, if all went as expected, the Reservation would be permanently reduced in size. Similarly, although the opened area could not accurately be assimilated to the "public domain" because it remained encumbered by tribal equitable ownership and was only made available to settlers on special conditions,[22] those lands were, for the time being, given some of the attributes of "public lands." [23]

At all events, such convenient short-hand references to the two portions of the Reservation cannot overcome the

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[22] See n.17, *supra*.

[23] The "surplus lands" were, after all, opened to entry under some of the "public land laws," albeit with significant qualifications. Perhaps the most useful short-hand description of unsold "surplus" lands opened to sale is that given by the Interior Department Solicitor in 1938 (56 Interior Dec. at 338): "qualified public lands and also qualified Indian lands."

detailed provisions of the statute. Cf. *Mattz*, 412 U.S. at 498. Knowing the true nature of the arrangement, we cannot be misled by a wrong label. In all essential respects, the 1908 Act is indistinguishable from the statutes examined in *Seymour* and *Mattz* and the consequences should be the same.[24]

2. Resort to legislative history gives no different answer. To be sure, the Indians were briefly consulted as to their willingness to part with the area to be opened. Since it was anticipated that purchasers would be found for all the lands, the Government representative quite understandably did not advert to the legal status of the area in the event that expectation was disappointed. And it is equally unsurprising that tribal spokesmen did not discuss that eventuality. Interestingly, one tribal leader preferred to have the Government "buy [the surplus lands] outright," fearing that "it [would] take years for all of the land to be disposed of." Pet. Br. App. A153. He was firmly told that a "lump sum" payment was impossible because "Congress will not accept anything of that kind." Pet. Br. App. A158. Nevertheless, the Indians presumably believed that white men wanted the land and would buy it sooner or later, and that, except for allotments, the entire area would be taken. Given that premise, there is nothing in the minutes of the truncated Indian meetings held by Inspector McLaughlin or

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[24] The Act of Mar. 22, 1906, ch. 1126, 34 Stat. 80 *et seq.*, considered in *Seymour*, is identical to the present statute except that (1) it does not contain a "school section" provision or one prohibiting the introduction of intoxicants, and (2) it provided for sale, rather than reservation of minerals on the opened tracts. As we have already noted, the first difference is irrelevant to our inquiry. The second, on the other hand, cuts in favor of continued Reservation status here.

The Act of June 17, 1892, ch. 120, 27 Stat. 52 *et seq.*, considered in *Mattz*, is much more abbreviated. If anything, it is more susceptible to being construed as a "termination" statute because the opened lands are made available under the land and mineral laws *without condition*. This was more arguably a "restoration to the public domain" than can be found in the 1908 Act now before the Court.

in his report that casts useful light on our question. What is relevant, however, is that, at the end of the day, no cession resulted. The Tribe, told it had no real option in light of *Lone Wolf*, mostly listened and never fully acquiesced in the opening arrangment. See, *e.g.*, Pet. Br. App. A124-A125, A127-A129, A141, A145-A146, A152, A161.[25]

Nor do the congressional debates and reports offer more. Again, although the Congress was careful not to commit itself to any payment from the Treasury (except for school sections), the prevailing optimism foreclosed any discussion of the consequences if homesteaders did not come forward in sufficient numbers. In these circumstances, no significance can be attached to a reference to the Reservation in one Committee Report as "diminished" (Pet. Br. App. A28). Indeed, another Report speaks of surplus lands "on the Cheyenne River and Standing Rock Indian reservations" (Pet. Br. App. A21, A36).

Finally, an amending statute of 1910 is invoked (Pet. Br. App. A17-A20). Reinstating the figure recommended two years earlier, that legislation increased (from $1.50 to $2.50 per acre) the price to be paid for the school sections, and, accordingly, made a larger appropriation for that purpose. See S.D. Counties' Br. App. C1-C51. Beyond this, the 1910 Act subjected the entire original Reservation to existing laws prohibiting the introduction of intoxicants into Indian country (Pet. Br. App. A19-A20). For the reasons already given (n.16, *supra*), we cannot construe this action as bearing on the issue of diminishment or disestablishment. At all events, this later statute, enacted *at the request of the Tribe*, can hardly affect what is claimed to have been a

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[25] In fact, one of the few tribal leaders present asked for more time to consider the matter in full Council and was cavalierly told to communicate the Tribe's views to the Agency Superintendent, who must forward them to reach Washington within two weeks. See Pet. Br. App. A50, A161. Unsurprisingly, no such communication was received before Inspector McLaughlin submitted his report. Pet. Br. App. A50-A51.

present cession two years earlier. See S. Rep. 518, 61st Cong., 2d Sess. 3, 5 (1910).

3. The subsequent history, as in most like cases, is confused and rife with inconsistencies. See *Seymour*, 368 U.S. at 356 n.12; *Mattz*, 412 U.S. at 484-485; *DeCoteau*, 420 U.S. at 442-444; *Rosebud*, 430 U.S. at 603-605. For the most part, it is no more reliable here than elsewhere in deciding the diminishment issue. Nevertheless, we may notice two points.

From the first, there were references to the opened area as a continuing part of the Reservation, both in Acts of Congress,[26] congressional reports and debates,[27] and executive documents.[28] So, also, the approved tribal constitution of 1935 gave the Tribe jurisdiction over the whole undiminished Reservation. See Pet. Br. 60.

Nor is the early jurisdictional history as one-sided as petitioners suggest. To be sure, in *United States* v. *La Plant*, 200 F. 92 (D.S.D. 1911), a district court, on questionable reasoning, declined jurisdiction of a homicide by one non-Indian against another in the opened area,[29] and

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[26] *E.g.*, the Act of June 23, 1910, ch. 369, 36 Stat. 602, authorizing the sale to a railroad of a tract in the opened area described as "in the Cheyenne River Reservation"; and Section 2 of the Act of Mar. 4, 1921, ch. 174, 41 Stat. 1447, permitting extension of time for payment of installments due by purchasers of land "in the Cheyenne River Reservation."

[27] *E.g.*, H.R. Rep. 1046, 61st Cong., 2d Sess. (1910); S. Rep. 723, 61st Cong., 2d Sess. (1910); H.R. Rep. 315, 62d Cong., 2d Sess. (1912); S. Reps. 209 and 216, 62d Cong., 2d Sess. (1912); 45 Cong. Rec. 5799-5810 (1910).

[28] References to the opened lands as "in" or "within" the Reservation occur in the President's opening Proclamation (38 Interior Dec. 157 (1909)), an Indian Department Order relating to selection of school sections (38 Interior Dec. 455 (1910)), and others extending the time for payment by purchasers (48 Interior Dec. 80 (1921); 49 Interior Dec. 131 (1922)).

[29] At the time, a special statute (Act of Feb. 2, 1903, ch. 351, 32 Stat. 793) provided—contrary to *United States* v. *McBratney*, 104 U.S. 621 (1882)—that, regardless of the race of the offender and

the State occasionally filled the void. But prosecutions by either sovereign, then as now, were rare, and, in fact, many civil and criminal matters continued to be handled by tribal and federal authorities within the opened lands. See *Hoxie Report* 100-108, 108-118.[30] In other respects, the United States remained the civilian administrator of the entire original Reservation, including the unsold lands. *Hoxie Report* 71-81, 87-93.

4. In our view, these facts are of secondary relevance. What is dispositive here, it seems to us, is that the opening up experiment in large measure failed, so that today the disputed area retains an important Indian character. As we have said, even though no immediate disestablishment was accomplished by enactment of the 1908 Act, that result might well have later occurred if settlers had, as expected, acquired all, or almost all, the opened lands—as was the case in *Rosebud*. But no such implied diminishment can be found when, as here, the Tribe's title to most of the opened land survived and has been formally "restored" by Interior Department orders.[31]

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the victim, certain enumerated crimes were within federal jurisdiction if committed on any "Indian Reservation" in South Dakota. Accordingly, the court in *La Plant should* have focused on whether the opened area of the Cheyenne River Reservation had been disestablished. In fact, however, the court based its ruling on a finding—erroneous in light of *Ash Sheep*—that Indian title had been extinguished by the 1908 Act as to unsold tracts. See 200 F. at 94-95.

[30] F. Hoxie, *Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908* (undated manuscript) [hereinafter cited as *Hoxie Report*]. This report was part of the record in *United States* v. *Dupris*, *supra*, and was incorporated as part of the record in the instant case, now transmitted to this Court.

[31] The area opened by the 1908 Act comprises approximately 1.6 million acres. By the time of the opening Proclamation of August 19, 1909, almost 400,000 acres in that area had been allotted to tribal members, and some 133,000 acres were subsequently allotted there. *Hoxie Report* 38, 88. After deducting some 90,000 acres for state school sections, this left about 1 million acres open to home-

Indeed, unless the question was irrevocably settled in 1908, it is difficult to attribute to anyone—including the Congress of 1908—an intent to treat as no longer part of the Reservation an area which includes the tribal capital, the Indian Agency and the major Indian town, within which some two-thirds of tribal members reside (outnumbering non-Indians there), and where almost half the acreage is Indian owned. Common sense rebels against that result.

What is more, compelling such a complex pattern, in a case like this one, defeats more recent congressional policy and unnecessarily creates jurisdictional problems. In 1934, implementing the Indian Reorganization Act, the Secretary of the Interior halted all further sales of "opened lands," including those on the Cheyenne River Reservation. See 54 Interior Dec. 559, 561, 563-564 (1934).[32]

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steaders. But it appears that relatively few entries were perfected, in large part because the extravagant promise of the "boosters," having got the settlers in, could not keep them there. See *Hoxie Report* 66-67. The restoration orders, affecting unsold tracts in the opened portion of the Reservation, cover all but one of the 78 townships that are embraced in whole or in part within the opened area. See 6 Fed. Reg. 3300 (1941); 14 Fed. Reg. 471 (1949); 17 Fed. Reg. 1065 (1951); 22 Fed. Reg. 3693 (1957); 30 Fed. Reg. 15588 (1965); 32 Fed. Reg. 14276 (1967). Although the actual acreage of the unsold lands affected by the major "restorations" of 1941 and 1951 (6 Fed. Reg. 3300 and 17 Fed. Reg. 1065) is not given, the detailed exclusion of tracts as small as a sixteenth of a section and individual townsite lots suggests that most of the remaining unallotted land was unsold. But, as on many other Reservations, a large number of allotments fell into non-Indian hands and this accounts for a substantial part of the "fee" holdings now existing in the former opened area. Nevertheless, today, almost half the opened area remains in Indian ownership, all of it, with minor exceptions, in trust or restricted status.

[32] On September 19, 1934, the Secretary of the Interior approved the recommendation of the Commissioner of Indian Affairs, joined by the Commissioner of the General Land Office, that all unsold lands within the opened areas of Indian Reservations be temporarily withdrawn from sale with a view to "restoration" under Section 3 of the IRA—specifically including lands covered by the

Most of the unsold area was "restored" to the Tribe in 1941 (6 Fed. Reg. 3300) and 1951 (17 Fed. Reg. 1065), smaller tracts in other years (14 Fed. Reg. 471 (1949); 22 Fed. Reg. 3693 (1957); 30 Fed. Reg. 15588 (1965); 32 Fed. Reg. 14276 (1957)). As the South Dakota Counties (Br. 46-47 & n.16) are at pains to point out, these orders expressly declared the restored acreage "part of the existing reservation."[33] Thus, it is common ground that much of the disputed area is today not merely "Indian country," but an integral portion of the Cheyenne River Reservation. In light of the congressional decision in 1948 to give like status to allotted and alienated tracts within a Reservation, it is hardly consistent to draw Reservation boundaries in the opened area in "checkerboard" fashion so as to include only restored lands.

1908 Act involved here. 54 Interior Dec. at 561-562, 563. This order was later amended to cover three further opened Reservations and to embrace unsold lots in townsites. *Id.* at 563-564. It is to be noted that, at the time, the Department's view was that restoration orders under Section 3 could only reach lands "usually referred to as surplus lands of Indian reservations." *Id.* at 560. Four years later, to be sure, it was held that lands "cut off" from Reservations, but as to which Indian beneficial title had not been extinguished, were equally subject to restoration under Section 3. 56 Interior Dec. 330, 333 (1938). But that does not impugn the opinion given in 1934 that the Cheyenne River Reservation was not diminished by the 1908 Act. At all events, it is clear that, at all times, the Department viewed "restored" lands as enjoying "Reservation status" thereafter. See 56 Interior Dec. at 333.

[33] Petitioners and those who support them argue that, because restoration orders invoked both Section 3 and Section 7 of the IRA (25 U.S.C. 463, 467), they should be construed as "adding" to the Reservation lands which had previously lost that status. But there is no stronger reason to take that view here than in respect of a similarly worded "restoration," by Act of Congress, in the case of the Colville Reservation. See *Seymour*, 368 U.S. at 356. As previously noted (n.18, *supra*), such orders are ambiguous on the interim status of surplus lands. But no one disputes the validity or effectiveness of those restoration orders as confirming or granting Reservation status to the "restored" lands for the future. See n.32, *supra*.

In our submission, every consideration argues for the obvious alternative: the Cheyenne River Reservation was not immediately diminished in 1908, and, notwithstanding the expectations of all concerned, the opened area survived as part of the Reservation. That solution is both practical and faithful to the intent of Congress. And it follows the Court's rule that only the clearest directive will destroy the protective shield of Indian Reservation status.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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